

This case is before the Board for the second time. In a June 2, 2006 decision, the Board set aside the Office's July 13, 2005 decision denying appellant's recurrence claim. The Board remanded the case for clarification of the impartial medical examiner's opinion as to whether appellant sustained a recurrence of disability beginning November 1, 2002, causally related to

her accepted April 29, 2002 employment injury.¹ The facts and the circumstances of that decision are hereby incorporated by reference.

On remand, the Office asked Dr. Mandel to provide a well-reasoned opinion as to whether appellant was totally disabled as of November 1, 2002. In a supplemental report dated September 5, 2006, Dr. Mandel opined, to a reasonable degree of medical certainty, that appellant was not totally incapacitated beginning November 1, 2002. He based his opinion partly on Dr. Valentino's November 18, 2002 and March 5, 2003 reports, which found no objective abnormalities on examination, and provided an opinion that appellant was fully recovered at that time. Dr. Mandel also stated that diagnostic studies were not impressive, noting that a cervical MRI scan showed no evidence of neural compromise or impingement, and cervical radiographs showed only mild degenerative changes at C5-6, consistent with appellant's age. He also noted that no other treating physician was able to confirm Dr. Witkin's clinical findings.

By decision dated September 26, 2006, the Office denied appellant's recurrence claim, finding that Dr. Mandel's opinion represented the weight of the medical evidence and resolved the conflict in medical opinion.

On September 29, 2006 appellant, through her representative, requested an oral hearing.

At the January 24, 2007 hearing, appellant's representative contended that Dr. Mandel's report was not well reasoned and not sufficient to resolve the conflict in medical opinion evidence. He requested that the Office obtain a new referee examination.

In a March 21, 2007 decision, the Office hearing representative set aside the September 26, 2006 decision and remanded the case to the Office for further clarification from Dr. Mandel. The representative noted that Dr. Mandel's report was thorough and well reasoned, and that he had properly considered Dr. Valentino's November 28, 2002 findings, as they were contemporaneous with appellant's work stoppage. However, the Office had not made May 7, 2004, March 9, 2005 and July 17, 2006 MRI scan reports available to Dr. Mandel for his review. Therefore, Dr. Mandel's September 5, 2006 report was insufficient to resolve the conflict in medical opinion.

The Office forwarded copies of MRI scan reports dated December 3, 2002, May 7, 2004, March 9, 2005 and July 17, 2006 to Dr. Mandel for review. It asked him whether the cervical MRI scans revealed any evidence of neural compromise or impingement.

In an April 13, 2007 report, Dr. Mandel stated that he had reviewed the MRI scan reports. The May 7, 2004 report showed a central disc herniation at C6-7 with no cord compression, as well as minimal bulging at C4-5 and C5-6. These conditions were unchanged since the prior April 2, 2003 CT scan. The March 9, 2005 MRI scan revealed a moderate central disc herniation

¹ Docket No. 06-248 (issued June 2, 2006). Appellant's claim was accepted for strain of her shoulder, neck and thoracic spine. The Office found a conflict of medical opinion between Dr. Evelyn D. Witkin, appellant's attending Board-certified orthopedic surgeon, and Dr. Steven Valentino, an osteopath, who provided a second opinion evaluation. Appellant was referred for examination by Dr. Richard J. Mandel, a Board-certified osteopath, selected as the impartial medical specialist.

at C6-7 compressing the thecal sac and the anterior aspect of the cervical cord. There was no abnormal signal within the spinal cord. There was a small central disc herniation at C4-5 without cord compression. The July 17, 2006 MRI scan report revealed a small broad-based central and left paracentral disc herniation at C6-7; a slight bulging of annuli at C5-6 and C7-T1; mild spondylosis at C6-7; and small osteophytes from C3-6 with mild degeneration. The spinal cord signal was normal. Dr. Mandel saw no change from the May 7, 2004 study.

Dr. Mandel stated that his review of the diagnostic studies did not change his opinion that appellant had not sustained a recurrence of disability on November 1, 2002. He noted that, although the reports were more detailed than previous studies, they indicated no change from 2004 with no evidence of spinal cord compression. Dr. Mandel opined that the March 2005 reading, which indicated cord compression at C6-7, was probably incorrect, based on technical factors inherent in this particular study. He stated that the fact that, prior and subsequent studies revealed no cord compression and no interval change, suggested that the 2005 reading was “spurious.” Dr. Mandel opined that, because the C6-7 herniation was central and to the left, not to the report, it was inconsistent with appellant’s right upper extremity complaints.

By decision dated May 29, 2007, the Office denied appellant’s recurrence claim, finding that Dr. Mandel’s well-reasoned opinion resolved the conflict and established that appellant had not sustained a recurrence of disability on November 1, 2002 due to the effects of the accepted work injury.

On May 31, 2007 appellant requested an oral hearing, which was held on September 25, 2007. Appellant’s representative argued that Dr. Mandel failed to provide any rationale as to the circumstances surrounding the alleged recurrence, and did not address whether her disc herniations were caused by the accepted injury. Counsel requested that the Office obtain a new referee opinion.

By decision dated November 13, 2007, the Office hearing representative affirmed the May 29, 2007 decision, finding that Dr. Mandel’s opinion represented the weight of the medical evidence. It established that appellant was not disabled as of November 1, 2002. The representative found that Dr. Mandel’s report was thorough and well rationalized and was entitled to special weight.²

LEGAL PRECEDENT

When an employee who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position, or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and of showing that she cannot perform such light duty. As part of this burden,

² By decision dated July 20, 2004, the Office terminated appellant’s medical and compensation benefits. On July 23, 2004 appellant requested an oral hearing on the termination decision. The Board notes that there is no evidence of record reflecting that the Office has issued a decision in that regard. As this matter is in an interlocutory posture, it is not before the Board on appeal. See 20 C.F.R. § 501.2(c).

the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.³

The Board notes that the term “disability,” as used in the Federal Employees’ Compensation Act, means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁴ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁵ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁶ Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁷

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary of Labor shall appoint a third physician who shall make an examination.⁸ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁹

ANALYSIS

The Office accepted appellant’s claim for shoulder, cervical and thoracic strains. Appellant stopped work on November 1, 2002, alleging that she sustained a recurrence of total disability on that date due to her accepted April 29, 2002 employment injury. She did not allege a change in the nature and extent of the light-duty job requirements.

On January 6, 2004 an Office hearing representative determined that there was a conflict in the medical opinion between Dr. Witkin, appellant’s attending physician, and Dr. Valentino, the Office’s referral physician, on the issue of whether appellant sustained a recurrence of total disability on or after November 1, 2002. In order to resolve the conflict, the Office properly referred appellant to Dr. Mandel for an impartial medical opinion on the matter. In a March 30,

³ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁴ *Patricia A. Keller*, 45 ECAB 278 (1993).

⁵ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁶ *Clement Jay After Buffalo*, 45 ECAB 707 (1994).

⁷ 20 C.F.R. § 10.5(x).

⁸ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁹ *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

2004 report, Dr. Mandel opined that appellant had no residuals from the April 29, 2002 injury; had fully recovered from the accepted injury; and could work for eight hours a day with no restrictions. Noting detailed examination findings, he found no objective abnormalities and no evidence that the accepted conditions were ongoing. In a supplemental report dated May 25, 2004, Dr. Mandel opined that appellant was not disabled as of November 1, 2002. By decision dated July 13, 2005, an Office hearing representative affirmed the Office's June 15, 2004 denial of appellant's claim, finding that the weight of the evidence was represented by Dr. Mandel's opinion.

In the June 2, 2006 decision, the Board found that Dr. Mandel's report was insufficient to resolve the conflict in medical opinion and remanded the case for clarification of whether appellant sustained a recurrence of total disability on or after November 1, 2002 due to her accepted employment injury. In a supplemental report dated September 5, 2006, Dr. Mandel opined, to a reasonable degree of medical certainty, that appellant was not totally incapacitated beginning November 1, 2002. He based his opinion partly on Dr. Valentino's November 18, 2002 and March 5, 2003 reports, which found no objective abnormalities on examination, and provided an opinion that appellant was fully recovered at that time. Dr. Mandel also stated that diagnostic studies were not impressive, noting that: a cervical MRI scan showed no evidence of neural compromise or impingement, and cervical radiographs showed only mild degenerative changes at C5-6, consistent with appellant's age. He noted further that no other treating physician was able to confirm Dr. Witkin's clinical findings.

By decision dated September 26, 2006, the Office denied appellant's recurrence claim, finding that Dr. Mandel's opinion resolved the conflict in medical opinion. However, on March 21, 2007 an Office hearing representative remanded the case to the Office, due to the fact that it had not made May 7, 2004, March 9, 2005 and July 17, 2006 MRI scan reports available to Dr. Mandel for his review in formulating his report.

After reviewing the diagnostic reports forwarded to him, Dr. Mandel reaffirmed his opinion that appellant had not sustained a recurrence of disability on November 1, 2002. He reviewed in detail the results of the MRI scan reports, indicating that the May 7, 2004 report showed central disc herniation at C6-7 with no cord compression. The March 9, 2005 MRI scan revealed moderate central disc herniation at C6-7, compressing the thecal sac and the anterior aspect of the cervical cord. There was no abnormal signal within the spinal cord. There was a small central disc herniation at C4-5 without cord compression. The July 17, 2006 MRI scan report revealed small broad-based central and left paracentral disc herniation at C6-7; a slight bulging of annuli at C5-6 and C7-T1; mild spondylosis at C6-7; small osteophytes from C3-6 with mild degeneration. The spinal cord signal was normal. Dr. Mandel explained that the March 2005 reading, which indicated cord compression at C6-7, was probably incorrect, based on technical factors inherent in this particular study. He stated that the fact that, prior and subsequent studies revealed no cord compression and no interval change, suggested that the 2005 reading was "spurious." Dr. Mandel opined that, because the C6-7 herniation is central and left, not right sided, it is inconsistent with appellant's right upper extremity complaints.

The Board finds that the weight of the medical evidence is represented by the opinion of Dr. Mandel, the impartial medical specialist selected to resolve the conflict in the medical opinion. Dr. Mandel's reports establish that appellant did not sustain an employment-related

recurrence of total disability on or after November 1, 2002. He performed a thorough examination of appellant and reviewed the statement of accepted facts and the entire medical record. As the Board found, in its prior decision, Dr. Mandel's original report lacked sufficient rationale to resolve the conflict in medical opinion. However, his subsequent reports include a thorough explanation of his opinion, which is based on a proper factual and medical history, that appellant was not disabled from work as of November 1, 2002 as a result of her accepted injury. Dr. Mandel reviewed the history of MRI scans in explaining his conclusion that appellant did not suffer from cervical cord compression. He properly considered the November 28, 2002 report of Dr. Valentino, which found no objective abnormalities on examination, and provided an opinion that appellant was fully recovered at that time. Dr. Valentino's examination findings were particularly relevant to the issue of appellant's disability on November 1, 2002, as they were contemporaneous with her work stoppage. Dr. Mandel also appropriately points out that, because appellant's C6-7 herniation is central and left, not right sided, it is inconsistent with appellant's right upper extremity complaints. The Board notes that in his March 30, 2004 report, Dr. Mandel concluded that it was inconceivable that multiple herniations could have occurred simultaneously as a result of simply lifting a mailbag and opined that the herniations reported by MRI scan were unrelated to the employment accident.

The Board finds that Dr. Mandel's opinion is thorough and well rationalized and based on a complete and accurate factual and medical background. Accordingly, it is entitled to special weight. His reports establish that appellant was not totally disabled on November 1, 2002, but rather was able to perform the duties of her limited-duty job. Therefore, the Office properly denied his claim for a recurrence of total disability.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on November 1, 2002 due to her April 29, 2002 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 13 and May 29, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 2, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board